In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1234

CATALDO CALEGRO DELUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of collecting extensions of credit by extortionate means, in violation of 18U.S.C. (Supp. V) 894, and interfering with interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. 1951. On May 1, 1970 he was sentenced to concurrent prison terms of eight years and a $10,000 fine on each count. The court of appeals affirmed (Pet. App. 1a-6a).

The evidence is summarized in the opinion of the court below (Pet. App. 2a-3a). In essence it shows

that petitioner loaned $42,000, at the rate of four per cent a week, to two New York brothers who were engaged in the fur business. In early May of 1969, the victims were contacted by agents of the F.B.I. who requested and obtained permission from them to install listening devices in their business office for the purpose of recording their conversations with petitioner. On May 12, upon the suggestion of the F.B.I. agents, one of the brothers, Leonard Horowitz, advised petitioner that he was unable to make his weekly payment. Later that day petitioner arrived at the brothers' office. The lengthy conversation that ensued was recorded and subsequently introduced in evidence.

At trial, Leonard Horowitz testified to making the loan and to the accuracy of the recorded conversation. On cross-examination, however, he denied that petitioner had threatened him and indicated that his relations with petitioner had been "cordial." The government then put on F.B.I. agents who testified that Horowitz had told them in May 1969 that petitioner was "vicious" and that he was afraid of petitioner both for his own life and for the lives of his family.

Petitioner contends that his conviction for violating 18 U.S.C. 894(a) should be reversed because that statute is unconstitutional. The question is pending before this Court in *Perez* v. *United States*, No. 600 this Term, certiorari granted, November 16, 1970.[1]

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[1] We note that all three circuits that have considered the constitutionality of 18 U.S.C. 894(a) have upheld it. See *United States* v. *Perez*, *supra*, 426 F. 2d 1073 (C.A. 2); *United States* v. *Fiore*, No. 7646 (C.A. 1), decided December 4, 1970,

Petitioner also contends that introduction of the tape recording of his conversation with the brothers was unlawful, because (a) the recording violated his Fourth Amendment rights and (b) it was hearsay. The latter claim is, as the court below held, insubstantial. The recording was not introduced for its truth but to show that petitioner had made the statements. It was thus clearly not hearsay. The argument that the recording of the conversation, with Leonard Horowitz' consent, violated petitioner's Fourth Amendment rights may well be resolved by *United States* v. *White*, No. 13, this Term, certiorari granted, 394 U.S. 957, argued October 20, 1970.[2]

In view of these circumstances, it would seem appropriate to defer disposition of the instant case until after *Perez* and *White* are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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petition for a writ of certiorari pending, No. 1259, this Term; *United States* v. *Biancofiori*, 422 F. 2d 584 (C.A. 7), certiorari denied, 398 U.S. 942.

[2] The recording in this case took place after the decision in *Katz* v. *United States*, 389 U.S. 347, unlike that in *White*.

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